
Supreme Court of Canada rules on dismissed employees' obligations to mitigate damages

Persons injured by breaches of contract may be entitled to damages, but the common law also obliges them to take reasonable steps to try to "mitigate", or lessen, the damages they suffer. Readers of *Focus* will recall that, in the employment context, this duty to mitigate generally requires a terminated employee to take reasonable steps to find an alternate source of income. What happens in cases where the only opportunity for such employment is with the former employer? Does the duty to mitigate require a terminated employee to return to work for the same employer who terminated them? The Supreme Court of Canada recently considered these questions and pronounced on the extent of the duty to mitigate in *Evans v. Teamsters Local Union No. 31* (May 1, 2008).

The dismissed employee was a business agent for the union employer for more than 23 years. Following union executive elections, in which the employee backed the unsuccessful incumbent, the new president sent a letter to the employee indicating that his employment was terminated. The employee and the employer attempted to negotiate the notice period but could not resolve the matter. During the negotiations the employee continued to receive his salary and benefits but he did not report for work.

Eventually the employer requested the employee to return to work to serve out the balance of the two-year notice period. It also informed the employee that if he failed to return to work, this would be deemed just cause and he would be terminated without notice. The employee responded by indicating that he would return to work if the employer rescinded the original termination letter. Rescinding the original termination letter would have extended the employee's notice period by approximately five months. The employer refused.

The dispute proceeded to litigation. The union argued that the employee's refusal to return to work was a breach of his duty to mitigate his damages. The employee asserted that, in light of the wrongful dismissal and the union's bad faith conduct in the dismissal, the employment relationship was severely poisoned, and he had significant fears in returning to work.

THE SUPREME COURT OF CANADA RULES ON THE DUTY TO MITIGATE

The issue before the top court was whether the duty to mitigate required the employee to return to work for the union. The resolution of this issue also required a determination of whether the employee was justified in refusing to return on the basis that the employment relationship was too severely damaged.

The Court stated that, in the absence of any barriers to employment such as a hostile environment, a loss of dignity, embarrassment, or humiliation, and where the salary and working conditions are not substantially different, it will be necessary for a dismissed employee to mitigate damages by returning to work for the same employer. The Court stated:

"Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity."

In the determination of what is reasonable, the Court stressed the importance of evaluating the non-tangible elements of the situation, such as the work atmosphere, the stigma, and the loss of

dignity, in addition to the tangible elements, such as the nature and conditions of the re-employment. This evaluation however must be *objective* and not *subjective*. In other words, what the court will consider to be reasonable is based on the facts and the circumstances as they would be perceived by a reasonable person in the employee's shoes, and not on the personal view of the dismissed employee.

In applying the above principles to the facts before it, the Supreme Court found that the employee's demand that the employer rescind the termination letter was unreasonable because it aimed simply to extend the notice period. The Court then considered whether there were significant barriers to the employee returning to work, such as a loss of dignity or an acrimonious relationship. Applying the objective test, the Supreme Court concluded:

“In my view, this evidence makes it clear that the relationship between Mr. Evans and the union was not seriously damaged and, given that the terms of employment were the same, it was not objectively unreasonable for him to return to work to mitigate his damages.”

On this objective basis, the Supreme Court of Canada ruled that the employee did not act reasonably in refusing to return to work for the union and had therefore failed in his duty to mitigate his damages. The employer was relieved of its obligation to pay notice damages and was awarded its costs for the appeal.

In Our View

Although this appeal did not involve *Wallace* damages (generally a lengthening of the notice period because of bad faith on the part of the employer in the manner of the termination) and was limited to the sole consideration of an employee's duty to mitigate, the Supreme Court nevertheless considered whether *Wallace* damages are subject to mitigation. In ruling that they are not, the Court stated that because *Wallace* damages are intended to compensate for the suffering caused by the means and the manner of dismissal (*i.e.* the bad faith on the part of the employer), the employee's ability to replace lost income through mitigation is irrelevant. The Court ruled that “*Wallace* damages ought therefore to be completely exempt from the need to mitigate.” It is unclear whether the Court's analysis in this respect will be relevant now that *Wallace* damages have been restated by [Keays v. Honda](#).

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